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No. 672.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1960.

VI MURPHY,

*Petitioner,*

*v.*

PEOPLE OF THE STATE OF COLORADO,

*Respondent.*

## PETITIONER'S REPLY BRIEF.


MATHIAS F. CORRIA,
80 Pine Street,
New York 5, New York,
*Attorney for Petitioner.*

*Of Counsel:*

C. LEE GOODBAR, JR.,
WILLIAM D. GOODBAR,
Colorado Springs, Colorado.

EUGENE F. SIKORSKY,
New York, New York.


March 7, 1961.

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## PETITIONER'S REPLY BRIEF.

Respondent's brief* emphasizes four assertions. First, respondent says the questions to petitioner were "material, relevant and essential", despite the fact that the concededly "grave step" of Gately's suspension during the pendency of disbarment proceedings was taken by the Colorado court without having heard the answers to those questions. Second, the brief states that a reporter has no privilege of nondisclosure of a confidential news source in the absence of statute, though respondent declares, with petitioner, that until *Garland v. Torre*, 259 F. 2d 545 (2d Cir. 1958), *cert. denied*, 358 U. S. 910, the question whether the Constitutional guarantee of freedom of the press protects the reporter against disclosure had not even been considered in the cases so holding. Third, respondent seems to urge

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* Referred to herein as "Br. Opp."

that the continued prospect of forced disclosure of confidential news sources is desirable as a means of policing the utterances of the public press. Fourth, respondent asserts that in this situation "the proper administration of justice . . . must take precedence over any incidental interference with the freedom of the press." Whether it must take precedence in a case such as this is a question left unanswered by respondent's arguments and authorities, and is one form of statement of the important question which petitioner claims should be decided by this Court, following the grant of this petition.

## Petitioner's Answers to the Questions of the Court Below Could Not Have Been "Material, Relevant and Essential".

As pointed out in the petition herein (pp. 18-20), the decision below, the contentions of the Colorado Attorney General below, and the provisions of the governing Colorado statute all make it clear that, although petitioner's testimony might have been thought relevant to the inquiry, it could hardly have been material, and surely was not essential to the outcome of the proceeding. Respondent (Br. Opp., p. 6) suggests that "circumstances in aggravation are always admissible where . . . the court was considering a grave step--the suspension of an attorney from practice . . .". But one seeks in vain to know what additional sanction or penalty could have been imposed on Gately, in the light of the pleadings below, if petitioner had testified that she received a copy of the petition in question from Gately.

Respondent's argument that the Colorado court was entitled to the "whole truth as to the attorney's conduct" (Br. Opp., p. 6) begs the question. As will be shown below, the authorities cited by respondent recognize that there are

limitations to the rule that testimony may be compelled. Petitioner's position is that in the balancing of interests the Constitutional guarantee of a free press is an appropriate limitation of that rule, and that the propriety of the limitation is particularly clear where, as here, the testimony sought to be compelled would not have affected the result of the proceeding.

## Respondent's Authorities do not Settle the Question in This Case.

Though petitioner does not question, as a general rule, the "fundamental maxim that the public . . . has a right to every man's evidence" (Br. Opp., p. 7), the quotations in respondent's brief affirmatively show that inquiry does not end with the statement of the maxim:

> "... When the course of justice requires the investigation of the truth, no man has any knowledge that is rightly private. All that society can fairly be expected to concede is that *it will not exact this knowledge when necessity does not demand it, or when the benefit gained by exacting it would in general be less valuable than the disadvantage caused;* ... The duty runs on throughout all, and does not abate; *it is merely sometimes not insisted upon.*"* 8 Wigmore, Evidence [3d Ed.] §2192 (Br. Opp., p. 8).

And in *Blair* v. *United States*, 250 U. S. 273, 281 (1919) (quoted in Br. Opp., pp. 9-10) this Court made clear that the witness claimed the benefit of no exception or qualification to the general obligation to testify, though the Court acknowledged that:

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* Emphasis supplied throughout.

> ". . . some confidential matters are shielded from considerations of policy, *and perhaps in other cases for special reasons a witness may be excused from telling all that he knows.*"

Neither *Blair,* nor *Blackmer* v. *United States,* 284 U. S. 421 (1932) (Br. Opp., p. 10), involved a newspaper reporter or freedom of the press. Moreover, both cases decided that a witness had no standing to challenge matters affecting solely the Constitutional rights of the accused in the proceedings. They do not stand for the proposition that a witness may not challenge the right to compel testimony, as petitioner did here, where the witness' Constitutional right not to testify is asserted.

The right to withhold testimony thought by the court in *In Re Grunow,* 84 N. J. L. 235, 236, 85 Atl. 1011, 1012 (1913) (Br. Opp., p. 11) to be ". . . far-reaching in its effect, and detrimental to the due administration of law" has for a number of years, subsequent to the decision in *Grunow,* been assured to newspaper men by statute in New Jersey, by legislatures which apparently disagreed with that court's conclusions. N. J. S. A. 2A:84A-21 (1960).

Respondent's quotations from *Plunkett* v. *Hamilton,* 136 Ga. 72, 83, 70 S. E. 781 (1911) and *Matter of Wayne,* 4 U. S. D. C. Hawaii 475, 476 (1914) (Br. Opp., pp. 10-11) show only that private agreements and journalistic ethics as such may not prevail over the interest of the public in full testimony. Those cases, like the other state cases cited by respondent, do not touch upon the question whether the Constitutionally-protected interest of the public in receiving all the news is also subordinate to its interest in full disclosure in judicial proceedings.

It is because this question is left unanswered in the state cases and unanswered by this Court that certiorari should be granted in this case.

**Freedom of the Press May Not be Impaired on the Possibility That Publications of an Irresponsible Newspaper "Could Result in Undesirable Consequences".**

Respondent argues (Br. Opp., pp. 2-3) that according to the press the protection requested by petitioner would be "dangerous," that an "irresponsible newspaper" could as a consequence publish "supposed facts of grave import" upon rumor "from an extremely doubtful source" without having to divulge the source, and that to accord protection to the press in preserving anonymity with respect to statements of fact "could result in undesirable consequences." Apparently the undesirable consequences referred to are the possibilities of public alarm and the loss of prestige of public officials. At the outset it should be noted that the only "supposed fact" published here was the undeniable fact that John Gately had filed a petition in court making charges against a former judge. But respondent's objection goes to the airing of the charges themselves, no matter how accurate the charges, and no matter how beneficial to the public good the publication may be. Respondent would deny the protection of news sources which the petition (pp. 8-14) shows to be vital to the press' ability to gather the news, especially news of this nature.

The notion that the right to publish charges of misconduct in office must be made to depend on the certain determination prior to publication of the accuracy and correctness of such charges has been refuted by this Court. In *Near* v. *Minnesota*, 283 U. S. 697, 719-720 (1931) the Court said:

> "While reckless assaults upon public men, and efforts to bring obloquy upon those who are endeavoring faithfully to discharge official duties, exert a baleful

> influence and deserve the severest condemnation in public opinion, it cannot be said that this abuse is greater, and it is believed to be less, than that which characterized the period in which our institutions took shape. Meanwhile, the administration of government has become more complex, the opportunities for malfeasance and corruption have multiplied, crime has grown to most serious proportions, and the danger of its protection by unfaithful officials and of the impairment of the fundamental security of life and property by criminal alliances and official neglect, emphasizes the primary need of a vigilant and courageous press, especially in great cities. The fact that the liberty of the press may be abused by miscreant purveyors of scandal does not make any the less necessary the immunity of the press from previous restraint in dealing with official misconduct."

The press must be immune from indirect, as well as direct, restraints on its ability to publish the news.

Neither petitioner nor her newspaper took the position at the time of publication in the article in question that Gately's charges had been proved, nor does respondent claim that petitioner's newspaper is irresponsible or that the content of the article derived from petitioner's imagination. In discussing the question, respondent correctly recognizes that the principle involved, and the future consequences of the decision herein, have an importance transcending the disposition of the case at hand.

The petition for certiorari suggests that the nature of the publication in this case and the minimal governmental interest here in disclosure of the confidential news source so distinguish this case from *Torre, supra* that the decision of the Court of Appeals in that case cannot be regarded as controlling here.

The impossibility of undertaking to keep news sources confidential, under the rule of the decision below, is a real

and dangerous restraint on news gathering. The ability to gather news is as essential to a free press as the right to publish news. Freedom of the press is a prerequisite to the proper functioning of a free society, and occupies a preferred place under the Constitution. Whether or not freedom of the press is to prevail, and under what conditions, over the public interest in obtaining the fullest possible disclosure in judicial proceedings is an important issue, presented by this case, deserving of consideration and decision by this Court.

Respectfully submitted,

MATHIAS F. CORREA,
80 Pine Street,
New York 5, New York,
*Attorney for Petitioner.*

Of Counsel:

C. LEE GOODBAR, JR.,
WILLIAM D. GOODBAR,
Colorado Springs, Colorado.

EUGENE F. SIKOROVSKY,
New York, New York.

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